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Supreme Court, U.S.
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No. 08-197

IN THE

Supreme Court of the United States

LINCOLN NORTH DEVELOPMENT CORPORATION,

Petitioner,

v.

TOWN OF KEARNY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION FOR RESPONDENTS TOWN OF KEARNY, MAYOR AND TOWN COUNCIL

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STATEMENT OF MATTER INVOLVED

Petitioner's application is rife with misstatements of fact[1] and premised on an inaccurate interpretation of Ordinance 64. Ordinance 64 does not affect the flow of interstate commerce, violate the Interstate Commerce Commission Termination Act nor does it interfere with federal mail. Simply stated, Ordinance 64 which has been in effect for nearly four years advances the municipal land use goals established by the Town's Master and Reexamination plans in promoting the most efficient use of the land while maintaining the established predominate uses. Petitioner has not and cannot maintain the dramatically inaccurate, unsubstantiated allegations or the prospective speculative harm alleged.

ORDINANCE 64

On November 9, 2004, the Town of Kearny ("the Town" or "Kearny") adopted Ordinance 2004-(0)-64 ("Ordinance 64") pursuant to the 2002 Reexamination Report of the Kearny 1991 Master Plan. This ordinance amended Chapter 38 of the Revised General Ordinances of the Town of Kearny by re-designating the SKM-1 and SKM-2 zones in South Kearny as SKI-N (South Kearny Industrial North) and SKI-S (South Kearny Industrial South) respectively. The major difference between the two new zones was that the storage, parking or use of

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[1] Petitioner has never established any of the facts alleged in reference to CSX. Petitioner proffered a half dozen fact witnesses for trial and presented the testimony of two, neither a representative of CSX. The record below is devoid of any evidence of the facts now asserted by Petitioner.

trucks, tractors, trailers and containers or any similar structure for storage purposes on a permanent basis was prohibited in all districts except SKI-N. Additionally, Ordinance 64 established new area, yard and bulk requirements, as well as providing new conditions for the storage of containers.

The Kearny Planning Board adopted Ordinance 64 after careful examination of the present zoning in the Town, the anticipated changes to the Town and its surrounding area, and the expected benefits to the Town if the zoning was implemented. As part of its review, the Town requested a Master Plan reexamination report, which was prepared in July 2002 ("2002 Report"). The 2002 Report was based upon consideration of the 1991 Master Plan Revision ("1991 Report").

1991 Report: The 1991 Report suggested the restructuring of South Kearny into two areas, SKM-1 and SKM-2. In recognizing that the uses in South Kearny included trucking terminals, general warehousing, chemical storage/warehousing and heavy industrial uses, the 1991 Report stated that "many of these uses were poor tax ratables and employment resources as well as unattractive and deleterious to the surrounding physical and visual environment."

With respect to trucking terminals, (*75% of which were located to the north of Lincoln Highway*), the 1991 Report stated that these were characterized by a "dominance of open trailer truck parking and storage with minimal on-site improvements" which were one of the most "physically unattractive and least productive land uses within the South Kearny area." The land south

of Lincoln Highway (40% of the total area in South Kearny) was used primarily for warehousing and distribution. Trucking terminals constituted a minority of the land use in this area.

In dividing South Kearny into two areas, the 1991 Report suggested that the SKM-1 (SKI-N) district should allow industrial, truck terminals, warehousing, outdoor storage and public utilities, as well as chemical processing facilities and the P.S.E. & G. fossil fuel power plant, while the SKM-2 (SKI-S) area should include industrial, manufacturing and warehousing. This division would meet the objectives of encouraging the transition away from the predominant trucking-oriented uses into light industrial and manufacturing activities, promoting redevelopment in South Kearny and maximizing as built tax ratables.

2002 Report: While the 2002 Report indicated generally that several of the objectives in the 1991 Report were no longer valid, it specifically referred to the recommendations in the earlier report as they relate to South Kearny as being "*increasingly valid.*" This conclusion is based on several factors, including "the prevailing land use pattern, recent redevelopment efforts and anticipated regional port improvements."

The 2002 Report recognized that South Kearny is located in a unique area since its southern border is the headwaters of Newark Bay, and the CSX and Norfolk Southern rail depots are located to the north. However,

there are several anticipated changes to the area. As stated in the 2002 Report:

> A number of significant projects are currently being developed, which will increase the scope and nature of economic activity in South Kearny. These events are centered upon the expansion of the regional port system to capitalize upon NAFTA and other recent free trade agreements. The most important projects include the dredging of Newark Bay to accommodate large-draft container ships, the construction of the truck-dedicated Portway system to move containers between the ports and surrounding intermodal facilities and the dissolution of Conrail into privately held CSX and Norfolk Southern. The Port Authority of New York and New Jersey anticipates that these changes will contribute to a doubling of port traffic by 2010 and a ten-fold increase by 2040.

The 2002 Report *predicted that the expansion of international trade would generate a local demand for industrial related activities, such as manufacturing, value added manufacturing and warehousing.* The report also predicted that the increase in the port traffic would create increased intermodal activity.

As stated in the 2002 Report:

> International trade will generate a local demand for industrial related activities, including manufacturing, value added

> manufacturing and warehousing. Increased port traffic will also create intermodal activity, as more and more containers are shipped in combination of rail and trucks. The core planning issue therefore revolves around establishing a balance between uses to ensure that existing activities can continue to grow and develop. Central to this balance is ensuring that intermodal oriented truck uses do not monopolize the peninsula's transportation network or land area. While the continued movement of trucks in distribution-activities is important to South Kearny's economy, the long-term storage of trucks and trailers is not a productive use of limited land and results in visual blight. The visual blight resulting from unregulated container storage not only discourages revitalization of South Kearny, but also adversely affects the entire image of the Town.

The proposed boundary was thereafter drawn so as to best accommodate the operating businesses with the need for expansion of industrial and manufacturing activities.

The majority of industrial operations are presently located predominately south of Lincoln Highway in the SKI-S area, and all of the present trucking operations and trucking terminals are located in the area designated SKI-N. The testimony of the Town's planning expert and the maps evidenced that the trucking operations are located predominantly in the

area north of Gypsum Street, east of Jacobus Avenue, south of Pennsylvania Avenue and west of the Hackensack River.

The boundary line differs slightly from the recommendation in the 1991 Report in order to take into account changing policy, the trend toward warehousing, and the goal of the 2002 Report. More importantly, the Town based the dividing line on a complete and thorough review of the area as proffered by Ms. Gruel and Mr. Martello the Town's sub-code official.

The whole of South Kearny is fully developed with truck terminals and freight forwarding facilities in the North and warehousing and distribution in the South. Intermodal and freight forwarding facilities ("trucking") is a primary use in the North and a permitted conditional or accessory use in the South. Additionally long term outside storage of merchandise is neither permitted nor necessary in the North, as trucking terminals by nature do not require storage beyond the loading and unloading of merchandise, which is permitted by Ordinance 64.

Kearny Municipal Ordinance 64 was enacted pursuant to, and in conformity with, Municipal Land Use Law.

Respectfully, review by this Court would be contrary to law. Despite petitioner's desire to create a critical issue of first impression, none exists. The record clearly and unequivocally establishes that Ordinance 64 does not interfere with interstate commerce; violate the commerce clause, conflict with either ICCTA or with the

federal postal distribution center. To the contrary, the facts as established in a three-day plenary hearing are contrary to petitioner's contentions, which are unsupported in fact and law.

REASONS FOR DENYING THE PETITION

I. KEARNY MUNICIPAL ORDINANCE 64 DOES NOT AFFECT INTERSTATE COMMERCE AND THUS DOES NOT VIOLATE THE COMMERCE CLAUSE.

Petitioner alleges that Ordinance 64 violates the Commerce Clause. Petitioner claims that their trucking businesses affect intrastate and interstate commerce, and that by curtailing or eliminating trucking related uses, the Town is impairing the flow of interstate commerce.

This allegation is unsupported by the record and was found to be without merit by both the Trial and Appellate Courts. Ordinance 64 does not prohibit trucks and other freight carriers from entering or leaving the state. The operations in both the SKI-N and the SKI-S continue unfettered. The vast majority of South Kearny is fully developed and the existing operations continue in both the North and South.

Petitioner's reliance on *Pittstown Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y. 1981), is misplaced. In that case, the court found that the municipal ordinance directly blocked the free flow of interstate and international commerce by prohibiting the port in Rochester from commercial cargo and shipping terminals and warehouse and distribution

centers resulting in the prohibition of *all* commercial interstate and international shipping activities. The ordinance in the case at bar is not prohibitive and does not impair the flow of commerce; it merely allocates certain areas on the land for specific types of businesses so that the land will be used profitably. The ordinance was enacted in 2004 and has not affected the flow of port traffic. The record is devoid of facts that support petitioner's contentions to the contrary. Petitioner's contention that trucking is not allowed in the South is incorrect. The predominate use of the South Zone is warehousing and distribution, however, intermodal use must be, and is, a permitted conditional and accessory use to warehousing and distribution. The "trucking prohibition" is merely the disallowance of truck and trailer yards which is nothing more than the long term parking of trucks and trailers for profit which is not the predominate use in the South Zone.

Even if petitioner could prove that interstate commerce would be slightly affected, New Jersey courts have recognized that:

> In the exercise of its police power, a municipality may enact an ordinance, which does restrict personal freedom and property rights and sometimes imposes burdens upon or affects interstate commerce. In the latter connection where the burden is incidental and the restriction warranted by local needs, it is generally held that such local legislation is valid. *Cunard S.S. Co. v. Lucci*, 92 N.J.Super. 148, 155, 222 A.2d 522 (Ch.Div.1966), aff'd 94

N.J.Super. 440, 228 A.2d 719 (App.Div.1967); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

The vast majority of the trucking operations are already located in the SKI-N zone; Ordinance 64 has no impact on them. The vast majority of the SKI-S zone is warehousing and distribution wherein trucking operations continue as a conditional and accessory use. Neither the SKI-N nor the SKI-S areas are impaired or impeded by Ordinance 64. In addition, the Ordinance has several significant purposes that greatly outweigh any minor inconvenience to the appellant.

Petitioner's contention that the report of its purported expert, Arthur L. Max, went unchallenged is erroneous. The Town challenged the report and the trial court held that Mr. Max's report was a net opinion.

At oral argument, petitioner brought to the Court's attention the report of their transportation expert, Authur L. Max of Weintraub, Casey and Zercow and Max dated November 24, 2005, submitted as a miscellaneous document, not specifically identified and certainly not articulated or presented in petitioner's brief. The Court ruled, as a matter of law that no Commerce Clause issue was presented. The Court further finds that the conclusions of Mr. Max are unsupported by factual evidence or other data and effectively is a net opinion.

The trial court properly held:

> The ordinance at issue does not impose a substantial burden (if any) burden on interstate commerce and plaintiff has failed to provide any evidence which indicates the ordinance will impose any burden on interstate commerce. The ordinance limits trucking to areas where trucking is generally occurring and allows existing trucking companies to continue operation. As Ordinance 64 does not have a discriminatory impact, places only an incidental (if any) burden on interstate commerce and is warranted by local needs, the ordinance would be valid under the Commerce Clause.

In sum, Ordinance 64 does not violate the Commerce Clause, as it has no impact on interstate commerce.

II. Ordinance 64 Has No Affect on the Hazardous Materials Transportation Act and Interstate Commerce Commission Termination Act.

Petitioner failed to plead the preemption of Ordinance 64 by either the Hazardous Materials Transportation Act (HMTA) or the Interstate Commerce Commission Termination Act (ICCTA). Petitioner raised both these issues in response to respondent's motion for summary judgment and the trial court properly held that neither Act was applicable nor was Ordinance 64 preempted by either Act.

In reference to the HMTA, the trial court held:

> The ordinance at issue is not in conflict with the explicit preemption provisions contained in the HMTA. Further, the zoning of specific areas for truck uses is not an area extensively regulated by the HMTA and plaintiff has not pointed to any evidence to indicate that the zoning ordinance in question would have the impact of impeding compliance with the provisions of the HMTA.

Similarly, in reference to the ICCTA, the trial Court held:

> There are several reasons why the Court finds there is no merit to this preemption argument. First, as noted by defendant, Town of Kearny Planning Board, the ordinance in question has no effect on CSX. The property owned by CSX is totally within the SKI-N district, which allows trucking and trucking terminals. Lot 18, owned by CSX was included in the SKI-N zone after fist being excluded from that zone. Town of Kearny Planning Board Trial Brief, p.20. Second, there has not been one *scintilla of proof submitted in certified form that would present a material issue of fact that "CSX's" railroad operations would be impaired by Ordinance No. 64.* Thus, Ordinance 64 does not interfere with any trucking uses of CSX and does not interfere with CSX's rail operations. (Emphasis added)

In sum, Ordinance 64 has no affect on the Hazardous Materials Transportation Act or the Interstate Commerce Commission Termination Act.

III. Ordinance 64 Has No Effect on the United States Post Office in South Kearny

Petitioner, for the first time in this action, claims that Ordinance 64 has a "criminal" effect on the United States Post Office located in South Kearny. The argument is both improperly raised and erroneous.

First, petitioner has no standing to raise the argument. The United States government is not party to this action nor has the government intervened in this action.

Second, the South Kearny Post Office is a warehouse and distribution center located in the SKI-N zone. The postal facility is a distribution center not a trucking facility; and because of its location in the SKI-N zone the Post Office may have trucking as its primary, accessory or conditional use. The suggestion that Ordinance 64 raises the possibility of a disruption of service at the U.S. postal facility, potential incarceration of the Town's employees etcetera is nothing short of absurd.

Lastly, and most importantly, the law is well settled that the Post Office is immune from local municipal ordinances. *Thanet Corporation v. Township of Princeton*, 108 N.J. Super 65 (App. Div. 1969) Petitioner's allegations of interference with the distribution of federal mail is inaccurate.

IV. Both the Zones Established by Ordinance 64 are in compliance with the predominate uses in South Kearny.

The north-south dividing line created by Ordinance 64 is in compliance with the preexisting uses in South Kearny. During the plenary hearing, the Town clearly established that the predominate use in the North section was intermodal while the southern section was predominately warehousing and distribution. The dividing line was drawn precisely to follow the predominate uses. As evidenced in the record, Town planner, Susan Gruel and the Kearny sub code official, Michael Martello, clearly established that there was no wholesale nonconformity.

The Trial Court correctly held:

> The Court does not find the boundary between the north and south sub zones in South Kearny is irregular and there is a rational basis for the zone boundary established under Ordinance No. 64 for the reasons enunciated by Ms. Gruel. Her identification of most of the trucking terminal facilities in the north zone has been proven to the Court's satisfaction.

Appellate review affirmed the Trial Court's findings. The record is devoid of evidence that suggests that Ordinance 64 renders either of the dominant uses in the SKI-N or the SKI-S non-conforming.

CONCLUSION

Petitioner's arguments are hollow as unsupported in fact and law. None of the dramatic contentions asserted are supported by the record below. Petitioner has inexplicably asked this Court to review nonexistent issues for which this Court could not grant relief. For all the foregoing reasons the respondent respectfully requests appellant's petition for certiorari be denied.

Respectfully submitted,

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